RULES OF CRIMINAL PROCEDURE FOR THE SUPERIOR COURT OF THE STATE OF DELAWARE

I. Scope, Purpose, and Construction

Rule 1. Scope.

These rules govern the procedure in all criminal proceedings in Superior Court and in preliminary or supplementary proceedings in other courts when the judge acts as a committing magistrate for Superior Court.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 2. Purpose and construction.

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

II. Preliminary Proceedings

Rule 3. Commencement and complaint.

(a) Commencement. Proceedings may be instituted by indictment, by complaint or, when lawful, by information or by arrest or summons without a warrant or complaint.

(b) Complaint. The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a committing magistrate or any other person authorized by law to issue a warrant. The complaint may be based upon personal knowledge or upon reasonable information and belief.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 4. Arrest warrant or summons; capias.

(a) Issuance. If it appears from the complaint, or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. A summons instead of a warrant may issue in the discretion of the committing magistrate. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue. In any case in which it is lawful for an officer to arrest a person without a warrant, the officer may, without a complaint having been filed, issue a summons in the form prescribed by statute instead of arresting the person.

(b) Probable cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.

(c) Form.

(1) Warrant. The warrant shall be signed by the committing magistrate and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available committing magistrate of the county in which the offense is alleged to have been committed or such other committing magistrate as provided by statute, court rule or administrative order. A copy of the complaint shall be attached to the warrant.

(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a committing magistrate at a stated time and place. When a complaint has been filed, a copy thereof shall be attached to the summons.

(d) Execution or service; and return.

(1) By whom. The warrant shall be executed by any officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(2) Territorial limits. The warrant may be executed or the summons may be served at any place within the jurisdiction of the State of Delaware.

(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant at the time of the arrest but upon request shall show the warrant to the defendant as soon as practicable. If the officer does not have the warrant at the time of the arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to the defendant personally, by leaving it at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by mailing a copy of the summons to the defendant's last known address.

(4) Return. The officer executing a warrant shall make return thereof to the committing magistrate before whom the defendant is brought pursuant to Rule 5. At the request of the attorney general any unexecuted warrant shall be returned to and cancelled by a committing magistrate at the court from which it was issued. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the committing magistrate before whom the summons is returnable. At the request of the attorney general made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the committing magistrate to the authorized person for execution or service.

(e) Defective complaint, warrant or summons.

(1) Amendment. No person arrested under a warrant or appearing in response to a summons shall be discharged from custody or dismissed because of any formal defect in the complaint, warrant or summons, but the complaint, warrant or summons may be amended so as to remedy any such formal defect.

(2) Issuance of new warrant or summons. If, prior to or during the preliminary examination it appears that the complaint, warrant or summons does not properly name or describe the defendant, or the offense with which the defendant is charged, or that although not guilty of the offense specified in such complaint, warrant or summons there is reasonable ground to believe that the defendant is guilty of some other offense, the committing magistrate shall not discharge or dismiss such defendant but shall forthwith cause a new complaint to be filed and shall thereupon issue a new warrant or summons.

(f) Capias. A capias issued by Superior Court shall be executed in the same manner as an arrest warrant. The committing magistrate before whom the defendant is brought shall hold the defendant to answer in Superior Court. Bail shall be fixed as endorsed on the capias or, in the absence thereof, as the committing magistrate deems appropriate in the circumstances.

(Adopted, effective Feb. 12, 1953; amended, effective June 1, 1969; revised, effective Jan. 1, 1992.)

Rule 5. Initial appearance before the committing magistrate.

(a) In general. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unreasonable delay before the nearest available committing magistrate of the county in which the offense is alleged to have been committed or such other committing magistrate as provided by the warrant or by statute, court rule or administrative order. If a person arrested without a warrant is brought before a committing magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the committing magistrate, the committing magistrate shall proceed in accordance with the applicable subdivisions of this rule.

(b) Offenses triable by the committing magistrate. If the charge against the defendant is triable by the committing magistrate, the committing magistrate may, with the consent of the attorney general, proceed to try or otherwise dispose of the charge in accordance with the rules of procedure of the committing magistrate's court.

(c) Offenses not triable by the committing magistrate. If the committing magistrate does not try or otherwise dispose of the charge against the defendant under subdivision (b) of this rule, the defendant shall not be called upon to plead. The committing magistrate shall inform the defendant of the complaint against the defendant and of any affidavit filed therewith, of the defendant's right to retain counsel or to request the assignment of counsel if the defendant is unable to obtain counsel, and of the general circumstances under which the defendant may secure pretrial release. The committing magistrate shall inform the defendant that the defendant is not required to make a statement and that any

statement made by the defendant may be used against the defendant. The committing magistrate shall also inform the defendant of the right to a preliminary examination. The committing magistrate shall allow the defendant reasonable time and opportunity to consult counsel and shall detain or conditionally release the defendant as provided by statute or in these rules.

(d) Scheduling preliminary examination. A defendant is entitled to a preliminary examination, unless waived, when charged with any offense that is within the exclusive jurisdiction of, or that the attorney general chooses to prosecute in, Superior Court. If the defendant waives preliminary examination, the committing magistrate shall forthwith hold the defendant to answer in Superior Court. If the defendant does not waive the preliminary examination, the committing magistrate shall schedule a preliminary examination. When the initial appearance is before a justice of the peace, the preliminary examination shall be held in the Court of Common Pleas if the defendant is an adult or in the Family Court if the defendant is a juvenile. When the initial appearance is in the Municipal Court for the City of Wilmington, the preliminary examination shall be held in the Municipal Court if the defendant is an adult or in the Family Court if the defendant is a juvenile. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if the defendant is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in Superior Court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times. In the absence of such consent by the defendant, time limits may be extended only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

(Adopted, effective Feb. 12, 1953; amended, effective June 1, 1969; May 1, 1974; May 31, 1978; Sept. 15, 1979; revised, effective Jan. 1, 1992.)

Rule 5.1. Preliminary examination.

(a) Probable cause finding. If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the defendant shall forthwith be held to answer in Superior Court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

(b) Discharge of defendant. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the complaint shall be dismissed and the defendant discharged. The discharge of the defendant shall not preclude the state from instituting a subsequent prosecution for the same offense.

(c) Records. After the proceeding is concluded, all papers in the proceeding and any bail taken shall be transmitted forthwith to the prothonotary of the proper county.

(d) Production of statements.

(1) In general. Rule 26.2(a)-(d) and (f) applies at any hearing under this rule, unless the court, for good cause shown, rules otherwise in a particular case.

(2) Sanctions for failure to produce statement. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to a moving party, the court may not consider the testimony of a witness whose statement is withheld.

(Added, effective May 1, 1974; revised, effective Jan. 1, 1992; amended, effective Mar. 1, 2001.)

III. Indictment and Information

Rule 6. The grand jury.

(a) Summoning grand juries. The court shall order one or more grand juries to be summoned at such time as the public interest requires.

(b) Objections to grand jury and to grand jurors.

(1) Challenges. The attorney general or a defendant who has been held to answer in Superior Court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified.

(2) Motion to dismiss. A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. It shall be made in the manner prescribed in 10 Del.C. § 4512 and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that the requisite number of jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(c) Foreperson and deputy foreperson. The court shall appoint one of the jurors to be foreperson and another to be deputy foreperson. The foreperson shall have power to administer oaths and affirmations and shall sign all indictments. The foreperson or another juror designated by the foreperson shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the prothonotary, but the record shall not be made public except on order of the court. During the absence of the foreperson, the deputy foreperson shall act as foreperson.

(d) Who may be present. The attorney general, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or

operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) Recording and disclosure of proceedings.

(1) Recording of proceedings. Proceedings, except when the grand jury is deliberating or voting, may be recorded stenographically or by an electronic recording device only with the approval of the court.

(2) General rule of secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, the attorney general, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to -

(i) The attorney general for use in the performance of such attorney's duty; and

(ii) Such government personnel (including personnel of a state or of the federal government) as are deemed necessary by the attorney general to assist in the performance of such attorney's duty to enforce the criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney general in the performance of such attorney's duty to enforce the criminal law. The attorney general shall promptly provide Superior Court, in the county before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made -

(i) When so directed by the court preliminarily to or in connection with a judicial proceeding;

(ii) When permitted by the court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) When the disclosure is made by the attorney general to another grand jury; or

(iv) When permitted by the court at the request of the attorney general, upon a showing that such matters may disclose a violation of state or federal criminal law, to an appropriate official of a state or of the federal government for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the county where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the state, the petitioner shall serve written notice of the petition upon (i) the attorney general, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and to be heard.

(4) Sealed indictments. The judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the prothonotary shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

(5) Closed hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) Sealed records. All records relating to grand jury proceedings shall be kept under seal, unless the court orders disclosure.

(f) Finding and return of indictment. An indictment may be found only upon the concurrence of the requisite number of jurors in accordance with 10 Del.C. § 4505. The indictment shall be returned by the grand jury to a judge in open court. If a complaint or information is pending against the defendant and the requisite number of jurors do not concur in finding an indictment, the foreperson shall so report to a judge in writing forthwith by marking the proposed indictment "ignored."

(g) Discharge and excuse. Grand jurors shall serve until discharged by the court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

(Adopted, effective Feb. 12, 1953; amended, effective June 14, 1962; May 31, 1964; Oct. 13, 1976; revised, effective Jan. 1, 1992.)

Rule 7. The indictment and the information.

(a) Use of indictment or information.

(1) In general. An offense which may be punished by death shall be prosecuted by indictment. An offense within the exclusive jurisdiction of Superior Court other than a capital crime shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

(2) Transfer cases. The prosecution shall proceed on the information filed in the Court of Common Pleas.

(3) Appeals de novo. The prosecution shall proceed on a new information filed in Superior Court charging substantially the same offense as charged by the complaint or information in the court below.

(b) Waiver of indictment. An offense within the exclusive jurisdiction of Superior Court other than a capital crime may be prosecuted by information if the defendant, after having been advised of the nature of the charge and of the rights of the defendant, waives in writing or in open court prosecution by indictment.

(c) Nature and contents.

(1) In general. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney general. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

(2) Harmless error. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

(e) Amendment. The court may permit an indictment or an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) Bill of particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment

or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

(Adopted, effective Feb. 12, 1953; amended, effective June 1, 1969; Jan. 1, 1972; July 1, 1976; Nov. 15, 1981; revised, effective Jan. 1, 1992.)

Rule 8. Joinder of offenses and of defendants.

(a) Joinder of offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 9. Warrant or summons upon indictment or information.

(a) Issuance. Upon the request of the attorney general certifying that there is a warrant or capias for the defendant outstanding, that there is a risk of flight or of danger to the public, or that there is other good reason that a warrant should issue in lieu of a summons, the court shall issue a warrant for each defendant named in an information or in an indictment. Upon the request of the attorney general a summons instead of a warrant shall issue. If no request is made, the court may issue either a warrant or a summons in its discretion. More than one warrant or summons may issue for the same defendant. The prothonotary shall deliver the warrant or summons to the sheriff or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Form.

(1) Warrant. The form of the warrant shall be as provided in Rule 4(c)(1) except that it shall be signed by the prothonotary and shall describe the offense charged in the indictment or information. Bail may be fixed by the court and endorsed on the warrant.

(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before the court at a stated time and place.

(c) Execution or service; and return.

(1) Execution or service. The warrant shall be executed or the summons served as provided in Rule 4(d)(1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy

to the corporation's last known address within the State or at its principal place of business elsewhere in the United States. An officer executing the warrant shall bring the arrested person without unreasonable delay before the nearest available committing magistrate of the county in which the offense is alleged to have been committed or such other committing magistrate as provided by the warrant or by statute, court rule or administrative order. When a defendant arrested with a warrant issued pursuant to this rule is brought before a committing magistrate, the committing magistrate shall hold the defendant to answer in Superior Court. Bail shall be fixed as endorsed on the warrant or, in the absence thereof, as the committing magistrate deems appropriate in the circumstances. When a defendant appears in Superior Court pursuant to a summons, the court shall set bail. If the defendant was previously charged with the same offense or with a different offense based on the same act or transaction, and the charge or charges were dismissed by the committing magistrate or by the attorney general, the court may reinstate bail previously posted by a professional or corporate surety. When the court orders bail reinstated, the surety shall be subject to the obligation of the bond previously executed. The prothonotary shall serve a notice of the reinstatement by mail upon the surety. Lack of notice shall not affect the obligation which shall continue until the condition of the bond has been satisfied or the court grants the surety's application to withdraw.

(2) Return. The officer executing a warrant shall make return thereof to the committing magistrate before whom the defendant is brought. At the request of the attorney general any unexecuted warrant shall be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney general made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the prothonotary to the sheriff or other authorized person for execution or service.

(Adopted, effective Feb. 12, 1953; amended, effective July 1, 1976; revised, effective Jan. 1, 1992.)

IV. Arraignment, and Preparation for Trial

Rule 10. Arraignment.

(a) In open court. Arraignment in open court shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead.

(b) By closed circuit television. Arraignment of incarcerated defendants pursuant to subdivision (a) of this rule may be conducted by closed circuit television. Television monitors shall be situated in the courtroom and at the place of incarceration so as to provide the public, the court, and the defendant with a view of the proceedings. A videotape of the proceedings shall constitute the record of the court.

(c) By written pleading.

(1) When permitted; effect. In lieu of arraignment in open court or by closed circuit television, an attorney for a defendant may, at or before the time scheduled for arraignment, direct the entry of a not guilty plea by written pleading to any charge other than murder in the first degree for which the defendant has been held to answer in Superior Court, including a reindictment, whether or not the defendant has been released on bail. A plea may be entered by written pleading to a charge for which the defendant has not been so held only when the charge arises from the same transaction as, or is joined in the same indictment or information with, a charge for which the defendant has been held to answer in Superior Court. The date that the pleading is filed shall be considered the date of arraignment. An attorney who files a not guilty plea by written pleading shall be deemed to have entered a general appearance for the defendant and shall thereafter be permitted to withdraw only with leave of the court for good cause.

(2) Form; service. The pleading shall state (1) the name and criminal action number of all charges to which a not guilty plea is entered, (2) the defendant's current address, and (3) the next scheduled court appearance which shall have been obtained from the court. In addition to service on the attorney general, the pleading shall be served on the defendant and, if bail has been posted, on the surety.

(3) Continuation of bail. When the nature or number of the charges is changed after the defendant is held to answer in Superior Court, the bail previously fixed shall apply to the new charges. The attorney general may move to increase the bail and the surety may move to withdraw.

(Adopted, effective Feb. 12, 1953; amended, effective Sept. 1, 1974; Sept. 1, 1986; Sept. 22, 1988; revised, effective Jan. 1, 1992.)

Rule 11. Pleas.

(a) Alternatives.

(1) In general. A defendant may plead not guilty, guilty, nolo contendere, or guilty but mentally ill. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) Conditional pleas [Omitted].

(b) Nolo contendere; guilty without admission. A defendant may plead nolo contendere or guilty without admitting the essential facts constituting the offense charged only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to defendant. No plea of guilty or nolo contendere shall be accepted to a class B misdemeanor, an unclassified misdemeanor or a violation for which no sentence of imprisonment will be imposed unless the court is satisfied that the defendant understands the nature of the charge and the maximum possible penalty provided by law. Before accepting a plea of guilty or nolo contendere to a felony or a class A misdemeanor, or to

any other offense for which a sentence of imprisonment will be imposed, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) If the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) That the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury, when applicable, and at trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) That if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) If the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring that the plea is voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney general and the defendant or the defendant's attorney.

(e) Plea agreement procedure.

(1) In general. The attorney general and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney general will do any of the following:

(A) File a dismissal of other charges; or

(B) Make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court.

The prosecuting attorney shall comply with 11 Del.C. § 5106.

(2) Notice of such agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Time of plea agreement procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(4) Inadmissibility of pleas, plea discussions, and related statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) A plea of guilty which was later withdrawn;

(B) A plea of nolo contendere;

(C) Any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) Any statement made in the course of plea discussions with the attorney general which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, a judgment of conviction upon a plea of guilty or nolo contendere may be admissible in any proceeding, and a statement under (C) or (D) of this paragraph is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining accuracy of plea. Notwithstanding the acceptance of a plea of guilty or nolo contendere, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the judgment.

(g) Record of proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea. The record shall also include a completed and executed plea agreement and a completed and executed waiver of rights on forms approved by the court.

(h) Harmless error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

(i) Guilty but mentally ill. A plea of guilty but mentally ill shall be accepted when the requirements of this rule applicable to a plea of guilty are met and the court finds that the defendant was mentally ill at the time of the offense, in accordance with 11 Del.C. § 408.

(Adopted, effective Feb. 12, 1953; amended, effective June 1, 1969; revised, effective Jan. 1, 1992; amended, effective Dec. 6, 1995; Nov. 7, 1997; July 1, 2001.)

Rule 12. Pleadings and motions before trial; defenses and objections.

(a) Pleadings and motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty, nolo contendere, and guilty but mentally ill. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) Pretrial motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Motions to compel discovery under Rule 16; or

(5) Motions for severance of charges or defendants under Rule 14.

(c) Motion date. The court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing.

(d) Notice by the state of the intention to use evidence [Omitted].

(e) Ruling on motion; certification for appeal. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record. Within 30 days of the entry of an order suppressing evidence before trial, the attorney general may present to the judge who entered the order a certification for appeal and a proposed order, in accordance with 10 Del.C. § 9902(b).

(f) Effect of failure to raise defenses or objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

(g) Records. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.

(h) Effect of determination. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that bail be continued for a specified time pending the filing of a new indictment or information.

Nothing in this rule shall be deemed to affect the provisions of any statute relating to periods of limitations.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 12.1. Notice of alibi.

Omitted.

Rule 12.2. Notice of insanity defense or expert testimony of defendant's mental condition.

(a) Defense of insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged offense, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney general in writing of such intention and file a copy of such notice with the prothonotary. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) Expert testimony of defendant's mental condition. If a defendant intends to introduce expert testimony relating to a mental illness, defect, psychiatric disorder or any other mental or emotional condition of the defendant bearing upon the issue of guilt, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney general in writing of such intention and

file a copy of such notice with the prothonotary. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Mental examination of defendant. In an appropriate case the court may, upon motion of the attorney general, order the defendant to submit to an examination. No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental or emotional condition on which the defendant has introduced testimony.

(d) Failure to comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's guilt.

(e) Inadmissibility of withdrawn intention. Evidence of an intention as to which notice was given under subdivision (a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

(Added, effective Jan. 1, 1992.)

Rule 12.3. Notice of defense based upon public authority.

(a) Notice by defendant; state response; disclosure of witnesses.

(1) Defendant's notice and state's response. A defendant intending to claim a defense of actual or believed exercise of public authority on behalf of a law enforcement or federal intelligence agency at the time of the alleged offense shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve upon the attorney general a written notice of such intention and file a copy of such notice with the prothonotary. Such notice shall identify the law enforcement or federal intelligence agency and any member of such agency on behalf of which and the period of time in which the defendant claims the actual or believed exercise of public authority occurred. If the notice identifies a federal intelligence agency, the copy filed with the prothonotary shall be under seal. Within ten days after receiving the defendant's notice, but in no event less than twenty days before the trial, the attorney general shall serve upon the defendant or the defendant's attorney a written response which shall admit or deny that the defendant exercised the public authority identified in the defendant's notice.

(2) Disclosure of witnesses. At the time that the state serves its response to the notice or thereafter, but in no event less than twenty days before the trial, the attorney general may serve upon the defendant or the defendant's attorney a written demand for the names and addresses of the witnesses, if any, upon whom the defendant intends to rely in establishing the defense identified in the notice. Within seven days after receiving the

state's demand, the defendant shall serve upon the attorney general a written statement of the names and addresses of any such witnesses. Within seven days after receiving the defendant's written statement, the attorney general shall serve upon the defendant or the defendant's attorney a written statement of the names and addresses of the witnesses, if any, upon whom the state intends to rely in opposing the defense identified in the notice.

(3) Additional time. If good cause is shown, the court may allow a party additional time to comply with any obligation imposed by this rule.

(b) Continuing duty to disclose. If, prior to or during trial, a party learns of any additional witness whose identity, if known, should have been included in the written statement furnished under subdivision (a)(2) of this rule, that party shall promptly notify in writing the other party or the other party's attorney of the name and address of any such witness.

(c) Failure to comply. If a party fails to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered in support of or in opposition to the defense, or enter such other order as it deems just under the circumstances. This rule shall not limit the right of the defendant to testify.

(d) Protective procedures unaffected. This rule shall be in addition to and shall not supersede the authority of the court to issue appropriate protective orders, or the authority of the court to order that any pleading be filed under seal.

(e) Inadmissibility of withdrawn defense based upon public authority. Evidence of an intention as to which notice was given under subdivision (a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

(Added, effective Jan. 1, 1992.)

Rule 13. Trial together of indictments or informations.

The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 14. Relief from prejudicial joinder.

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney general to deliver to the court for inspection in camera any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial.

(Adopted, effective Feb. 12, 1953; amended, effective June 1, 1969; revised, effective Jan. 1, 1992.)

Rule 15. Depositions.

(a) When taken. Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is detained, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) Notice of taking. The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at the examination and keep the defendant in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause the defendant's removal from the place of the taking of the deposition, the defendant persists in conduct which is such as to justify exclusion from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but a failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) Payment of expenses. Whenever a deposition is taken at the instance of the state, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the state.

(d) How taken. Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without that defendant's consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The state shall make available to the defendant or the defendant's counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the state and to which the defendant would be entitled at the trial.

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible, may be used as substantive evidence in accordance with the Delaware

Uniform Rules of Evidence or 11 Del.C. § 3507. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered and any party may offer other parts.

(f) Objections to deposition testimony. Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.

(g) Deposition by agreement not precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.

(h) Videotaped deposition of child witness. A videotaped deposition of a child witness may be taken in accordance with 11 Del.C. § 3511.

(Adopted, effective Feb. 12, 1953; amended, effective Sept. 15, 1979; revised, effective Jan. 1, 1992.)

Rule 16. Discovery and inspection.

(a) Disclosure of evidence by the state.

(1) Information subject to disclosure.

(A) Statement of defendant. Upon request of a defendant the state shall disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant or a codefendant (whether or not charged as a principal, accomplice or accessory in the same or in a separate proceeding), or copies thereof, within the possession, custody, or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the attorney general; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a state agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The state shall also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a state agent if the state intends to use that statement at trial. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of that testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness was involved.

(B) Defendant's prior record. Upon request of the defendant, the state shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the attorney general.

(C) Documents and tangible objects. Upon request of the defendant the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defendant's defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of examinations and tests. Upon request of a defendant the state shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the state, and which are material to the preparation of the defense or are intended for use by the state as evidence in chief at the trial.

(E) Expert witnesses. Upon request of a defendant, the state shall disclose to the defendant any evidence which the state may present at trial under Rules 702, 703, or 705 of the Delaware Uniform Rules of Evidence. This disclosure shall be in the form of a written response that includes the identity of the witness and the substance of the opinions to be expressed.

(2) Information not subject to disclosure. Except as provided in paragraphs (A), (B), (D) and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the attorney general or other state agents in connection with the investigation or prosecution of the case, or of statements by state witnesses or prospective state witnesses.

(3) Grand jury transcripts. Except as provided in Rules 6 and 26.2, and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

(b) Disclosure of evidence by the defendant.

(1) Information subject to disclosure.

(A) Documents and tangible objects. If the defendant requests disclosure under subdivision (a)(1)(C), (D) or (E) of this rule, upon compliance with such request by the state, the defendant, on request of the state, shall permit the state to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant

and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of examination and tests. If the defendant requests disclosure under subdivision (a)(1)(C), (D) or (E) of this rule, upon compliance with such request by the state, the defendant, on request of the state, shall permit the state to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

(C) Expert witnesses. If the defendant requests disclosure under subdivision (a)(1)(E) of this rule, upon compliance with the request by the state, the defendant, on request of the state, shall disclose to the state any evidence the defendant may present at trial under Rules 702, 703, or 705 of the Delaware Uniform Rules of Evidence. This disclosure shall be in the form of a written response that includes the identity of the witness and the substance of the opinions to be expressed.

(2) Information not subject to disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by state or defense witnesses, or by prospective state or defense witnesses, to the defendant, the defendant's agents or attorneys.

(c) Continuing duty to disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.

(d) Regulation of discovery.

(1) Protective and modifying orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the Supreme Court in the event of an appeal.

(2) Failure to comply with a request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other

order as it deems just under the circumstances. However, failure of the state to comply with paragraph (B) of subdivision (a)(1) of this rule shall not prohibit the introduction or consideration of a defendant's prior conviction in a sentencing proceeding. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(3) Procedure.

(A) Request. The defendant may serve a request under subdivision (a) after the filing of an indictment or information but not later than ten days after arraignment or such other time as ordered by the court. The state may serve a request under subdivision (b) not later than ten days after service on the attorney general of a request by the defendant or such other time as ordered by the court. The request shall set forth the items sought with reasonable particularity and shall specify a reasonable time, place and manner of compliance with the request.

(B) Response. The party upon whom the request is served shall serve a response within 20 days after service of the request or at such other time as ordered by the court. The response shall comply with the request or specify any objection to it. The response may specify a reasonable alternative time, place and manner of compliance not later than ten days before trial.

(C) Motion to compel. If a party fails to comply with a request the opposing party may move for an order compelling compliance with the request. A motion to compel shall be filed within ten days after the time for response or at such other time as ordered by the court.

(4) Service and filing. All requests for discovery under this rule and responses thereto shall be served on other counsel or parties but shall not be filed with the court. In lieu thereof, the party requesting discovery and the party responding shall file with the court a "Notice of Service" certifying that a request or response was served and the date and manner of service. The party responsible for service shall retain custody of the original. In cases involving out-of-state counsel, local counsel shall be the custodian. When a party uses any part of a request or response at trial or in proceedings on a motion, that party shall file it with the court. When a discovery request or anything produced in response to such a request is needed for any reason, the court, on its own motion, on motion by any party, or by stipulation of counsel, shall order the custodian to deliver it to the court. When a party files discovery material with the court other than during trial, the party shall file a notice stating, in no more than one page, the reason for filing the material and setting forth an itemized list thereof.

(Adopted, effective Feb. 12, 1953; amended, effective Jan. 1, 1965; Sept. 1, 1974; Feb. 1, 1979; July 21, 1989; revised, effective Jan. 1, 1992.)

Rule 17. Subpoena.

(a) For attendance of witnesses.

(1) Form; issuance. A subpoena shall be issued by the prothonotary under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The prothonotary shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a committing magistrate in a proceeding before the committing magistrate under the seal of the committing magistrate's court.

(2) Bail in lieu of subpoena. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and that it may be impracticable to secure the presence of the witness by subpoena, the court may require the witness to give bail as security for appearance as a witness and shall commit a witness who fails to give bail. The court may direct that the witness' deposition be taken in accordance with Rule 15(a) and may order the release of a witness who has been detained for an unreasonable length of time.

(b) Defendants unable to pay. The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the state.

(c) For production of documentary evidence and of objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

(d) Service. A subpoena may be served by the sheriff, by a deputy sheriff or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named.

(e) Place of service. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the State of Delaware.

(f) For taking deposition; place of examination.

(1) Issuance. An order to take a deposition authorizes the issuance by the clerk of the appropriate court in the state in which the deposition is to be taken of subpoenas for the persons named or described therein.

(2) Place. The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court, taking into account the convenience of the witness and the parties.

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued.

(h) Information not subject to subpoena. Statements made by witnesses or prospective witnesses may not be subpoenaed from the state or the defendant under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2.

(i) Witness from without a state. The attendance of a witness from without a state may be secured pursuant to 11 Del.C., c. 35, Subchapter II.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 17.1. Pretrial conference.

At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or the defendant's attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and the defendant's attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.

(Added, effective June 1, 1969; revised, effective Jan. 1, 1992.)

V. Venue and Transfer

Rule 18. Place of prosecution and trial.

Except as otherwise provided by statute or by these rules, the prosecution shall be had in the county in which the offense is alleged to have been committed. When two or more offenses that may be charged in the same indictment or information pursuant to Rule 8(a) are alleged to have been committed in more than one county, the prosecution may be had in any county in which one or more of the offenses is alleged to have been committed.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 19. Reverse amenability proceedings.

(a) Record. When a case is transferred pursuant to 10 Del.C. § 1010, the clerk of the Family Court shall transmit to the prothonotary all papers in the proceeding and any bail taken, and the prosecution shall continue in accordance with these rules.

(b) Reverse amenability. Within 10 days of arraignment, a juvenile defendant may petition the Court for a transfer of the case to the Family Court pursuant to 10 Del.C. § 1011. An evidentiary hearing will be scheduled within 45 days of the filing of the petition. Upon the conclusion of the evidence, the Court may allow written arguments to

be submitted by the parties provided all submissions are filed within 10 days of the hearing.

(c) Decision on reverse amenability. Within 20 days of the submission of written arguments after a reverse amenability hearing, or within 20 days of the hearing if no written arguments are allowed, the Court will either render to the parties its decision or will provide the parties an estimate of when the decision will be rendered. Such additional time shall not normally exceed an additional ten days unless the assigned Judge shall have filed a certification pursuant to Rule 19(d).

(d) Extensions. The schedule for the filing of a petition pursuant to 10 Del.C. § 1011, for a reverse amenability hearing to be held, or for a decision to be rendered shall not be extended unless the assigned Judge certifies that:

(1) The demands of the case and its complexity make the schedule under this Rule incompatible with the ends of justice; or

(2) The hearing cannot reasonably be held or the decision rendered within such time because of the complexity of the case or the number or complexity of pending criminal cases.

(e) Referral to Commissioner. In the event of a referral by a Judge to a Commissioner of a reverse amenability petition for proposed findings of fact and recommendations pursuant to Rule 62, the hearing shall be scheduled and the proposed Findings of Fact and Recommendations shall be filed consistent with an expedited schedule to be included within the Order of Reference. In the event of an appeal from the Commissioner's Findings of Fact and Recommendations, the assigned Judge will make a de novo determination within the time allowed by Rule 19(c) and (d).

(Added, effective Aug. 1, 1996.)

Rule 20. Transfer from the county for plea and sentence.

(a) Indictment or information pending. A defendant arrested, held, or present in a county other than that in which an indictment or information is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive trial in the county in which the indictment or information is pending, and to consent to disposition of the case in the county in which that defendant was arrested, held, or present, subject to the approval of the attorney general. Upon receipt of the defendant's statement and of the written approval of the attorney general, the prothonotary of the county in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the prothonotary of the county in which the defendant is arrested, held, or present, and the prosecution shall continue in that county.

(b) Indictment or information not pending. A defendant arrested, held, or present, in a county other than the county in which a complaint is pending against that defendant may state in writing a wish to plead guilty or nolo contendere, to waive venue and trial in the county in which the warrant was issued, and to consent to disposition of the case in the

county in which that defendant was arrested, held, or present, subject to the approval of the attorney general. Upon filing the written waiver of venue in the county in which the defendant is present, the prosecution may proceed as if venue were in such county.

(c) Effect of not guilty plea. If after the proceeding has been transferred pursuant to subdivision (a) or (b) of this rule the defendant pleads not guilty, the prothonotary shall return the papers to the county in which the prosecution was commenced, and the proceeding shall be restored to the docket of the court in that county. The defendant's statement that the defendant wishes to plead guilty or nolo contendere shall not be used against that defendant.

(d) Juveniles. A juvenile who is arrested, held, or present in a county other than that in which the juvenile is alleged to have committed an act in violation of a statute not punishable by death or life imprisonment may, after having been advised by counsel and with the approval of the court and the attorney general, consent to be proceeded against as a juvenile delinquent in the county in which the juvenile is arrested, held, or present. The consent shall be given in writing before the court but only after the court has apprised the juvenile of the juvenile's rights, including the right to be returned to the county in which the juvenile is alleged to have committed the act, and of the consequences of such consent.

(Added, effective Jan. 1, 1992.)

Rule 21. Transfer from the county for trial.

(a) For prejudice in the county. The court upon motion of the defendant shall transfer the proceeding as to that defendant to another county whether or not such county is specified in the defendant's motion if the court is satisfied that there exists in the county where the prosecution is pending a reasonable probability of so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial in that county.

(b) Transfer in other cases. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another county.

(c) Proceedings on transfer. When a transfer is ordered the prothonotary shall transmit to the prothonotary of the county to which the proceeding is transferred all papers in the proceeding and any bail taken, and the prosecution shall continue in that county.

(Adopted, effective Feb. 12, 1953; amended, effective Mar. 2, 1984; revised, effective Jan. 1, 1992.)

Rule 22. Time of motion to transfer.

A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

VI. Trial

Rule 23. Trial by jury or by the court.

(a) Trial by jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the state.

(b) Jury of less than twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.

(c) Trial without a jury. In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

(Adopted, effective Feb. 12, 1953; amended, effective June 1, 1969; revised, effective Jan. 1, 1992.)

Rule 24. Trial jurors.

(a) Examination. In addition to the examination required by 11 Del.C. § 3301 in capital cases, the court shall conduct or permit such examination as is reasonably calculated to ascertain prejudice of a juror. The court shall itself conduct the examination of prospective jurors. The court shall permit the defendant or the defendant's attorney and the attorney general to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper. Except for questions whose need arises in the course of the examination, all questions proposed by an attorney shall be in writing and shall be served on the other parties and submitted to the court before commencement of the drawing of the jury or at such earlier time as ordered by the court. Except for the statutory questions in capital cases, questions may, in the court's discretion, be directed to the array or to prospective jurors individually or some questions may be directed to the array and some to prospective jurors individually. The order of individual examination shall be random. The order may be determined manually or electronically and may be determined in advance of when each prospective juror is called for questioning. If determined in advance, the order of individual examination will not be disclosed to the parties.

(b) Peremptory challenges.

(1) Number of challenges. In capital cases, the state shall be entitled to 12 peremptory challenges and the defendant or defendants shall be entitled to a total of 20 peremptory challenges. In noncapital cases, the state shall be entitled to 6 peremptory challenges and the defendant or defendants shall be entitled to a total of 6 peremptory challenges.

(2) Additional challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly. For good cause, the court may grant the parties such additional peremptory challenges as the court, in its discretion, deems appropriate. A request for additional

challenges shall be made before commencement of the drawing of the jury or at such earlier time as ordered by the court.

(3) Exercise of challenges.

(A) Capital cases. In capital cases, peremptory challenges shall be exercised at the conclusion of the examination of each prospective juror. The defendant or defendants shall first challenge or announce that they are content with the first prospective juror examined, the state shall first challenge or announce that it is content with the next prospective juror, and so on alternately until the jury is selected. Announcement that a party is content shall not count as the exercise of a challenge.

(B) Noncapital cases. In noncapital cases, peremptory challenges shall be exercised after the prospective jurors have been impanelled. The defendant or defendants shall first challenge or announce that they are content and the parties shall thereafter challenge alternately until all parties have exhausted their challenges. Announcement that a party is content shall count as the exercise of a challenge. A party may not later challenge a prospective juror who was impanelled when the announcement was made unless the court grants relief from this restriction for good cause.

(c) Alternate jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

(d) Challenge to array. A challenge to the array of jurors shall be made in the manner prescribed in 10 Del.C. § 4512 and shall be granted under the conditions prescribed in that statute.

(Adopted, effective Feb. 12, 1953; amended, effective May 13, 1969; June 1, 1969; April 23, 1973; Aug. 17, 1976; Oct. 13, 1976; June 1, 1984; revised, effective Jan. 1, 1992; amended, effective Oct. 14, 1993.)

Rule 25. Judge; disability.

(a) During trial. If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly

sitting in or assigned to the court, upon certifying familiarity with the record of the trial, may proceed with and finish the trial.

(b) After verdict or finding of guilt. If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if that judge is satisfied that a judge who did not preside at the trial cannot perform those duties or that it is appropriate for any other reason, that judge may grant a new trial.

(Adopted, effective Feb. 12, 1953; amended, effective June 1, 1969; revised, effective Jan. 1, 1992.)

Rule 26. Taking of testimony.

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by law or by these rules, the Delaware Uniform Rules of Evidence, or the rules of the Supreme Court.

(Added, effective Jan. 1, 1992.)

Rule 26.1. Conferences during trial.

All sidebar conferences and chambers conferences during trial shall be recorded unless the trial judge determines, in advance, that neither evidentiary nor substantive issues are involved.

(Added, effective Jan. 1, 1992.)

Rule 26.2. Production of statements of witnesses.

(a) Motion for production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney general or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified. For purposes of the application of this subdivision at a hearing on a motion to suppress evidence under Rule 12(b)(3), a law enforcement officer shall be deemed a witness called by the State.

(b) Production of entire statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.

(c) Production of excised statement. If the other party claims that the statement contains privileged information or matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that are privileged or that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection shall be preserved by the attorney general, and, in the event of a

conviction and an appeal by the defendant, shall be made available to the Supreme Court for the purpose of determining the correctness of the decision to excise the portion of the statement.

(d) Recess for examination of statement. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess the proceedings for the examination of such statement and for preparation for its use in the proceedings.

(e) Sanction for failure to produce statement. If the other party elects not to comply with an order to deliver a statement to the moving party at a trial, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney general who elects not to comply, shall declare a mistrial if required by the interest of justice. If the other party elects not to comply at an evidentiary hearing, the court shall not consider the affidavit or testimony of the witness.

(f) Definition. As used in this rule, a "statement" of a witness means:

(1) A written statement made by the witness that is signed or otherwise adopted or approved by the witness;

(2) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof; or

(3) A statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

(g) Scope of rule. This rule shall apply at trials and evidentiary hearings in criminal proceedings.

(Added, effective Jan. 1, 1992.)

Rule 26.3. Mistrial.

Before ordering a mistrial, the court shall provide an opportunity for the state and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives.

(Added, effective Jan. 1, 1992.)

Rule 27. Proof of official record.

An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1991.)

Rule 28. Interpreters.

The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the state, as the court may direct.

(Adopted, effective Feb. 12, 1953; amended, effective June 1, 1969; revised, effective Jan. 1, 1992.)

Rule 29. Motion for judgment of acquittal.

(a) Motion before submission to jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the state is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of decision on motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) Motion after discharge of jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

(d) Conditional ruling on grant of motion [Omitted].

(Adopted, effective Feb. 12, 1953; amended, effective June 1, 1969; revised, effective Jan. 1, 1992.)

Rule 29.1. Closing argument.

After the closing of evidence the prosecution shall open the argument. The defense shall be permitted to reply. The prosecution shall then be permitted to reply in rebuttal.

(Added, effective Jan. 1, 1992.)

Rule 30. Instructions.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after the arguments are completed or at both times. All instructions shall be given by the court orally. In capital cases the court shall, and in other cases the court may, give the jury a copy of the instructions for use during deliberations. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before or at a time set by

the court immediately after the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

(Adopted, effective Feb. 12, 1953; amended, effective Jan. 1, 1965; revised, effective Jan. 1, 1992.)

Rule 31. Verdict.

(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

(b) Several defendants or counts. If there are two or more defendants or two or more counts, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed, or with respect to a count or counts as to which it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree, or the count or counts as to which it does not agree, may be tried again.

(c) Conviction of included offense. The defendant may be found guilty of an offense included in the offense charged in accordance with 11 Del.C. § 206.

(d) Poll of jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

VII. Judgment

Rule 32. Sentence and judgment.

(a) Sentence.

(1) Imposition of sentence. Sentence shall be imposed without unnecessary delay, but the court may, when there is a factor important to the sentencing determination that is not then capable of being resolved, postpone the imposition of sentence for a reasonable time until the factor is capable of being resolved. When there is a presentence investigation, the court shall provide the counsel for the defendant and the attorney general with the presentence officer's determination, pursuant to the provisions of subdivision (c)(2)(B), of the sentencing classifications and sentencing guideline range believed to be applicable to the case. At the sentencing hearing, the court shall afford the counsel for the defendant and the attorney general an opportunity to comment upon the presentence officer's determination and on other matters relating to the appropriate sentence. Before imposing sentence, the court shall also -

(A) Determine that the defendant's counsel or, when the defendant is acting pro se, the defendant have had the opportunity to read the presentence investigation report made available pursuant to subdivision (c)(3);

(B) Afford counsel for the defendant an opportunity to speak on behalf of the defendant, and

(C) Address the defendant personally and determine if the defendant wishes to make a statement and to present any information in mitigation of the sentence.

The attorney general shall have an equivalent opportunity to speak to the court. The victim shall have an opportunity to speak, in accordance with guidelines established by the court. Upon a motion that is jointly filed by the defendant and by the attorney general, the court may hear in camera such a statement by the defendant, counsel for the defendant, or the attorney general.

(2) Notification of right to appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise a defendant who is not represented by counsel of the defendant's right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere.

(3) Habitual criminal; greater sentence. The attorney general shall file a motion to declare the defendant an habitual criminal pursuant to 11 Del.C. § 4214 promptly after conviction and before sentence. Whenever it appears that a defendant may be subject to a greater sentence because of a previous conviction, the court shall proceed in accordance with 11 Del.C. § 4215.

(b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the prothonotary.

(c) Presentence investigation.

(1) When made. A presentence officer shall make a presentence investigation and report to the court before the imposition of sentence when the court, after considering the benefit of immediate sentencing and whether there is in the record information sufficient to enable a meaningful exercise of sentencing authority, directs. Except with the written consent of the defendant, the report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty.

(2) Report. Unless the court orders a limited investigation, the report of the presentence investigation shall contain -

(A) Information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the

defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

(B) The classification of the offense and of the defendant under the categories established by the Sentencing Accountability Commission pursuant to 11 Del.C. § 6580 that the presentence officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Accountability Commission; and an explanation by the presentence officer of any factors that may indicate that a sentence of a different kind or of a different length from one within the applicable guideline would be more appropriate under all the circumstances;

(C) Any pertinent policy statement issued by the Sentencing Accountability Commission;

(D) A victim impact statement in accordance with 11 Del.C. § 4331(d);

(E) Such other information as may be required by statute or the court.

(3) Disclosure. At least 7 days before imposing sentence, unless this minimum period is waived, the court shall allow the defendant's counsel or, when the defendant is acting pro se, the defendant and the attorney general to read the report of the presentence investigation, including the information required by subdivision (c)(2) but not including any final recommendation as to sentence. The court shall afford the parties an opportunity to comment on the report and, in the discretion of the court, to present information relating to any alleged factual inaccuracy contained in it. If the comments or information presented allege any factual inaccuracy in the presentence investigation report, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. At the request of a party a written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Department of Correction.

(d) Plea withdrawal. If a motion for withdrawal of a plea of guilty or nolo contendere is made before imposition or suspension of sentence or disposition without entry of a judgment of conviction, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only by motion under Rule 61.

(e) Partial confinement; probation. After conviction of an offense other than a class A felony, the court may impose a term of partial confinement or probation if permitted by law, or any other disposition authorized by 11 Del.C. § 4204.

(f) Sentences of death.

(1) Time from sentencing date. The date set for an execution of a defendant sentenced to death shall be in accordance with the applicable Administrative Directive promulgated by the Supreme Court of Delaware.

(2) Time of execution. The court's death sentencing order shall specifically provide that the execution shall take place between the hours of 12:01 a.m. and 3:00 a.m. pursuant to 11 Del.C. § 4209(f).

(3) Witnesses to execution. The court's death sentencing order shall specifically provide that no more than ten (10) witnesses shall witness said execution pursuant to 11 Del.C. § 4209(f).

(4) Unless otherwise ordered by the court, witnesses to an execution shall be selected pursuant to a procedure to be determined and supervised by the Commissioner of the Department of Correction and shall include, pursuant to Del.C. § 4209(f), an adult member of the victim's immediate family as defined in 11 Del.C. § 4350(e), or his or her designee if a written request is made to the Commissioner by the Attorney General or the Attorney General's designee at least ten (10) days prior to the scheduled date of execution.

(g) Restitution. Restitution in accordance with law shall be determined as follows:

(1) Immediate Sentencing.

(A) When sentence is imposed without a presentence report, restitution shall be as provided in the plea agreement.

(B) If the plea agreement does not contain a restitution agreement, restitution shall be determined upon the filing of a Restitution Claim Form with the Office of Investigative Services no later than 60 days after sentencing. Except for good cause shown, failure to file a timely claim for restitution shall be deemed a waiver of a claim for restitution. Filing may be accomplished by mailing a completed Restitution Claim Form to the Office of Investigative Services.

Upon receipt of a Restitution Claim Form, the Office of Investigative Services shall notify the defendant and the attorney for defendant of the claim. The defendant shall be notified by first class mail, at defendant's last known address. The defendant shall have 60 days from the date of mailing to file a response by mail with the Office of Investigative Services.

Within 30 days of the receipt of a response or of the expiration of the deadline for response, the Office of Investigative Services shall send the Restitution Claim Form to the sentencing Judge together with a recommendation as to restitution. A copy of the Office of Investigative Services recommendation to the sentencing Judge shall be sent to the prosecutor and the attorney for the defendant.

The sentencing Judge in his or her discretion may order restitution based on the papers filed or may order a hearing thereon.

(2) Presentence Investigation. When a presentence investigation is ordered, the Office of Investigative Services shall furnish the victim with a Restitution Claim Form which shall be returned to the Office of Investigative Services within 30 days of the date of mailing. Except for good cause shown, failure to timely return a Restitution Claim Form shall be deemed a waiver of restitution. The Office of Investigative Services shall recommend restitution based on the Restitution Claim Form and all information presented in the presentence report. If the defendant objects to restitution as recommended, the sentencing Judge in his or her discretion may order a hearing thereon or determine restitution without a hearing.

(3) Restitution Claim Form. The Restitution Claim Form shall provide for all forms of restitution permitted by law and shall be furnished to the Department of Justice for distribution to all victims of crime pursuant to 11 Del.C. § 9411(a)(4).

(Adopted, effective Feb. 12, 1953; amended, effective June 1, 1969; Jan. 1, 1988; revised, effective Jan. 1, 1992; amended, effective Oct. 21, 1994; Nov. 8, 1995; Nov. 1, 1997; Nov. 7, 1997; June 1, 2003.)

Rule 32.1. Revocation or modification of partial confinement or probation.

(a) Revocation of partial confinement or probation. Whenever a person is taken into or held in custody on the grounds that the person has violated a condition of partial confinement or probation, the person shall be brought without unreasonable delay before a committing magistrate or a judge of Superior Court for the purpose of fixing bail and, if not released on bail, shall be afforded a prompt hearing before a judge of Superior Court on the charge of violation. The person shall be given:

(A) Written notice of the alleged violation;

(B) Disclosure of the evidence against the person;

(C) An opportunity to appear and to present evidence in the person's own behalf;

(D) The opportunity to question adverse witnesses; and

(E) Notice of the person's right to retain counsel and, in cases in which fundamental fairness requires, to the assignment of counsel if the person is unable to obtain counsel.

(b) Modification of partial confinement or probation. The requirements of subdivision (a) of this rule shall apply before the terms or conditions of partial confinement or probation can be modified, unless the relief to be granted to the person on partial confinement or probation upon the person's request or the court's own motion is favorable to the person, and the attorney general, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term

of partial confinement or probation is not favorable to the person for the purposes of this rule.

(Added, effective Jan. 1, 1992.)

Rule 33. New trial.

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

(Adopted, effective Feb. 12, 1953; amended, effective Mar. 12, 1958; June 1, 1969; revised, effective Jan. 1, 1992.)

Rule 34. Arrest of judgment.

The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea of guilty or nolo contendere, or within such further time as the court may fix during the 7-day period.

(Adopted, effective Feb. 12, 1953; amended, effective June 1, 1969; revised, effective Jan. 1, 1992.)

Rule 35. Correction or reduction of sentence.

(a) Correction of sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

(b) Reduction of sentence. The court may reduce a sentence of imprisonment on a motion made within 90 days after the sentence is imposed. This period shall not be interrupted or extended by an appeal, except that a motion may be made within 90 days of the imposition of sentence after remand for a new trial or for resentencing. The court may decide the motion or defer decision while an appeal is pending. The court will consider an application made more than 90 days after the imposition of sentence only in extraordinary circumstances or pursuant to 11 Del.C. § 4217. The court will not consider repetitive requests for reduction of sentence. The court may suspend the costs or fine, or reduce the fine or term or conditions of partial confinement or probation, at any time. A motion for reduction of sentence will be considered without presentation, hearing or argument unless otherwise ordered by the court.

(c) Correction of sentence by sentencing court. The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.

(Adopted, effective Feb. 12, 1953; amended, effective June 23, 1960; June 1, 1969; Jan. 16, 1975; Sept. 12, 1977; Jan. 1, 1988; revised, effective Jan. 1, 1992; Oct. 21, 1994.)

Rule 36. Clerical mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

VIII. Appeal

Rule 37. Appeal and certification to Supreme Court.

(a) Generally. The procedure on appeal shall be as provided in the rules of the Supreme Court.

(b) Transmission of record. The prothonotary shall comply with Supreme Court Rule 9(b).

(c) Preparation of transcript. The court reporter, counsel, and the trial judge shall comply with Supreme Court Rule 9(e).

(d) Mandate. The court shall comply with Supreme Court Rule 19(c).

(e) Continuing duty of counsel. Counsel shall comply with Supreme Court Rule 26(a).

(f) Certification of questions of law. The prothonotary, counsel and the court shall comply with Supreme Court Rule 41.

(Adopted, effective Feb. 12, 1953; amended, effective Jan. 25, 1962; revised, effective Jan. 1, 1992.)

Rule 37A. Notice to attorney general; filing information.

Transferred.

Rule 37.1. Notice to attorney general; appeals de novo; appeals on the record.

Omitted.

Rule 38. Stay of execution.

(a) Death. A sentence of death shall be stayed pending automatic review in accordance with Supreme Court Rule 35(a) and the sentencing judge shall comply with Supreme Court Rule 35(b).

(b) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken from the conviction or sentence and the defendant is released pending disposition of the appeal pursuant to Supreme Court Rule 32.

(c) Fine. A sentence to pay a fine or a fine and costs, or any payment pursuant to 11 Del.C., c. 90, if an appeal is taken, may be stayed upon such terms as the court deems

proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs with the prothonotary, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating such defendant's assets.

(d) Partial confinement; probation. A sentence of partial confinement or probation may be stayed if an appeal from the conviction or sentence is taken. If the sentence is stayed, the court shall fix the terms of the stay.

(e) Criminal forfeiture; restitution. A judgment of criminal forfeiture entered pursuant to Rule 40 or an order of restitution imposed as part of the sentence pursuant to 11 Del.C. § 4204(c)(9) may, if an appeal of the conviction or sentence is taken, be stayed by the court upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance upon disposition of the appeal, including entry of an order requiring a deposit in whole or in part of the monetary amount involved with the prothonotary or execution of a performance bond.

(f) Disabilities. A civil or employment disability arising under a statute by reason of the defendant's conviction or sentence, may, if an appeal is taken, be stayed by the court upon such terms as the court finds appropriate. The court may take any other action that may be reasonably necessary to protect the interest represented by the disability pending disposition of the appeal.

(Added, effective Jan. 25, 1962; revised, effective Jan. 1, 1992.)

Rule 39. Appeal to Superior Court.

(a) Time. All appeals to Superior Court shall be taken within 15 days from the date of sentence, unless otherwise provided by statute. When an appeal is taken the clerk of the court below shall forthwith transmit the appeal bond and a certified transcript of the record to the prothonotary.

(b) De novo. The prothonotary shall not enter an appeal de novo until the appeal bond and a certified transcript of the record is filed with the prothonotary. On the entry of an appeal the prothonotary shall forthwith give notice in writing thereof to the attorney general. On receipt of such notice the attorney general shall promptly file an information with the prothonotary, whereupon the proceeding will continue in accordance with these rules.

(c) On the record. An appeal on the record shall proceed in accordance with Superior Court Civil Rules 72 and 72.1 so far as they are applicable to criminal cases and are not inconsistent with a statute or these rules and/or with Supreme Court Rule 26 when appropriate.

(d) Stay. An appeal to, or writ of certiorari issuing from, Superior Court shall operate as a stay of the judgment and proceedings in the court below on giving the required bond and surety. The decision of the judge of the court below as to bond and surety may be reviewed by a judge of this court.

(e) Assigned counsel. Counsel assigned in other courts to represent an indigent defendant in criminal proceedings or a child in delinquency proceedings shall also represent them on appeal to this court. This court may appoint additional or substitute counsel for an appellant. Fees and disbursements for the representation of an indigent defendant before this court shall be governed by Rule 44.

(f) By the state. The state shall file a notice of appeal under 10 Del.C. § 9902 or an application for appeal under 10 Del.C. § 9903 within 30 days of the entry of the order appealed from. An application for appeal shall contain a statement of the nature of the proceeding below and of the substantial question of law or procedure to be decided. An appeal by the state shall be on the record.

(g) Collateral proceeding. A person who claims that a final conviction in another court is subject to collateral attack must first apply for relief in the other court. An appeal may be taken to this court within 15 days after the court below has entered a final order on the application. An appeal in a collateral proceeding shall be on the record.

(h) Dismissal. An appeal may be dismissed for lack of jurisdiction or for failure to comply with a statutory requirement or rule or order of this court.

(Added, effective Jan. 1, 1965; revised, effective Jan. 1, 1992; amended Oct. 26, 1995.)
Rule 39.1. Dismissal of appeals.
Omitted.

IX. Supplementary and Special Proceedings
Rule 40. Criminal forfeiture.
(a) Motion for forfeiture. When the state seeks to forfeit property of a person charged with a criminal offense pursuant to a statute authorizing a criminal forfeiture, such as 11 Del.C. § 1506 or 11 Del.C. § 2324, it shall file a motion for forfeiture not later than 20 days before trial of the criminal offense. The motion shall allege the factual and legal basis for forfeiture and the extent of the interest or property subject to forfeiture.

(b) Demand for jury; waiver. A defendant who elects trial by jury of the issue of forfeiture must serve a demand for a trial by jury of the issue on the attorney general not later than 10 days before trial. The failure of a party to serve a demand for trial by jury as required by this rule constitutes a waiver of the right to trial by jury of the issue of forfeiture.

(c) Trial of the issue. If the defendant is found guilty of the offense charged, the trier of fact shall decide the issue of whether the property is subject to forfeiture. The state shall have the burden of proof on the issue by a preponderance of the evidence and both parties may present additional evidence on the issue.

(d) Special verdict. The jury, after receiving additional instructions from the court, shall return a special verdict as to the extent of the interest or property subject to forfeiture, if any.

(e) Entry of judgment. When a verdict of the jury or a decision of the court contains a finding of property subject to criminal forfeiture, the court shall enter a judgment declaring a forfeiture of the property, subject to subdivision (g) of this rule. The judgment of forfeiture shall authorize the attorney general to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper. Property not subject to forfeiture shall be returned to the party entitled to it.

(f) Notice of forfeiture. When the court declares a forfeiture in accordance with subdivision (e) of this rule, it shall require public notice of the forfeiture for a period of not less than thirty (30) days, with direct notice to such parties as the court deems appropriate.

(g) Third party claim. Any third party who claims an interest in the property may appear and assert such interest in a manner and within such time as the court may direct in the notice. If the court is satisfied that a party has a legitimate interest that is not subject to forfeiture, the court shall protect that interest on such terms and conditions as the court deems just.

(Added, effective Jan. 1, 1992.)
Rule 41. Search and seizure.
(a) In general. The procedure governing search and seizure shall be as provided by 11 Del.C., c. 23 or other applicable law.

(b) Property or person which may be seized with a warrant [Omitted].

(c) Issuance and contents [Omitted].

(d) Execution and return with inventory [Omitted].

(e) Motion for return of property. A person aggrieved by the deprivation of property seized by the police may move the court for the return of the property on the ground that such person is entitled to lawful possession of the property. The motion may be made in the county where criminal proceedings are pending for which the state is holding the property or, if criminal proceedings are not pending, in the county where the property was seized. If the motion is granted, the property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings.

(f) Motion to suppress. A motion to suppress evidence may be made in the county of trial as provided in Rule 12. The motion shall set forth the standing of the movant to make the application and shall state the grounds upon which it is made with sufficient specificity to give the state reasonable notice of the issues and to enable the court to determine what

proceedings are appropriate to address them. The court shall receive evidence on any issue of fact necessary to the decision of the motion, but the court shall not receive evidence on motions challenging the manner of execution of a search warrant or the veracity of a sworn statement used to procure a search warrant unless the motions are supported by affidavits, or their absence is satisfactorily explained in the motion, and the allegedly false statement is necessary to the finding of probable cause.

(g) Return and filing of papers. The committing magistrate or judge before whom the warrant is returned shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith. The committing magistrate shall file them with the clerk of the committing magistrate's court and the judge shall file them with the prothonotary.

(h) Scope and definition [Omitted].

(i) Records. The prothonotary shall keep a record of all applications for warrants sought in Superior Court and shall have custody of all original papers in connection therewith.

(Adopted, effective Feb. 12, 1953; amended, effective Oct. 15, 1955; Oct. 15, 1981; revised, effective Jan. 1, 1992.)

Rule 42. Criminal contempt.

(a) Summary disposition. A criminal contempt under 11 Del.C. § 1271(1) may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition upon notice and hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the attorney general or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which a statute so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 42.1. Protection of victims and witnesses.

The court shall protect victims and witnesses pursuant to 11 Del.C. § 3535 and 11 Del.C., c. 51, subchapter III.

(Added, effective Jan. 1, 1992.)

Rule 42.2. Expungement of criminal records.

The court shall dispose of petitions for expungement of criminal records pursuant to 11 Del.C., c. 43, subchapter VII.

(Added, effective Jan. 1, 1992.)

X. General Provisions

Rule 43. Presence of the defendant.

(a) Presence required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued presence not required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,

(1) Is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), or

(2) After being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

(c) Presence not required. A defendant need not be present in the following situations:

(1) A corporation may appear by counsel for all purposes.

(2) In prosecutions for offense punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a question of law.

(4) At a reduction of sentence under Rule 35.

(5) At an arraignment by written pleading under Rule 10(c).

(Adopted, effective Feb. 12, 1953; amended, effective Apr. 4, 1963; revised, effective Jan. 1, 1992; amended, effective Nov. 9, 1993.)

Rule 44. Right to and assignment of counsel.

(a) Right to assigned counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned, pursuant to 11 Del.C. § 5103, to represent that defendant at every stage of the proceedings from initial appearance before the committing magistrate or the court through appeal when required by law or deemed appropriate by the court unless, after the court has advised the defendant of the dangers and disadvantages of acting pro se and has found the defendant competent to do so, the defendant waives such appointment.

(b) Assignment procedure. The assignment procedures for implementing the right set out in subdivision (a) shall be those provided by 29 Del.C., c. 46, by this rule or by administrative order. Appointment of counsel for state officers and employees pursuant to 11 Del.C. § 5105 is governed by Supreme Court Rule 68.

(c) Joint representation. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

(d) Disqualification of public defender. When the court rules that the public defender is disqualified, the court shall assign other counsel. The court may contract with attorneys to serve as assigned counsel when the public defender is disqualified. Fees and disbursements of contract counsel shall be governed by their contracts. Fees and disbursements of contract counsel and of assigned counsel under subdivision (e) of this rule shall be subject to the approval of the Administrative Office of the Courts.

(e) Fees and disbursements. The following procedures shall apply to assigned counsel other than the public defender and contract counsel:

(1) Application. Assigned counsel shall make separate application for compensation and reimbursement to this court and to each other court before which assigned counsel represents a defendant, except that services before a committing magistrate shall be considered services before this court. An application to this court shall specify the time expended, services rendered and expenses incurred while the case was pending before this court, and all compensation and reimbursement sought, expected or received in the same case from any other source. The court shall set the compensation and reimbursement to be paid to the attorney.

(2) Standard for setting fees. Assigned counsel shall be compensated at a rate not exceeding $60 per hour and shall be reimbursed for expenses reasonably incurred. Compensation paid for services performed in this court shall not exceed $2,000 for each attorney in a case in which 1 or more felonies, or acts of delinquency which would be felonies if committed by an adult, are charged; or $1,000 for each attorney in a case in which only misdemeanors, or lesser acts of delinquency, are charged. These maximum amounts shall not prevent any such attorney from being compensated for services performed in other courts involving the same representation.

(3) Waiver of maximum. Payment to assigned counsel in excess of the maximum amounts provided herein may be made for extended or complex representation if the court finds that the amount of such payment is necessary to provide fair compensation and the payment is approved by the court.

(4) Disbursements. Upon prior application assigned counsel may apply ex parte for funds to pay for transcripts, witness' travel expenses, or investigative, expert, or other services necessary for adequate representation. Upon finding, after appropriate inquiry, that the expenditures are necessary and that the defendant is financially unable to bear them, the court shall authorize counsel to incur such necessary expenditures in such amounts as the court shall authorize. Such counsel may also make expenditures without prior authorization and subject to later review for investigative, expert or other services or costs necessary for adequate representation, but the total of such expenditures made without prior authorization shall not exceed $200.00.

(f) On appeal. In any case where an indigent defendant appeals to the Supreme Court and the ground of the appeal requires a review of the evidence, counsel shall request the trial judge to be furnished without charge with a copy of the transcript of relevant trial testimony. The cost of the transcript shall be certified by the court for payment. In cases where the Supreme Court certifies to this court the appointment of counsel and the amount set by the Supreme Court as compensation for counsel's services and expenses, this court shall certify the amount of payment.

(g) Recoupment of defense costs. The court may order recoupment of defense costs pursuant to 10 Del.C., c. 86.

(Adopted, effective Feb. 12, 1953; amended, effective June 30, 1954; Oct. 15, 1975; Feb. 22, 1977; Oct. 15, 1980; Sept. 15, 1983; July 1, 1984; revised, effective Jan. 1, 1992; amended, effective Sept. 21, 1994; Mar. 16, effective May 1, 2000.)

Rule 45. Time.

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by statute, the day of the act, event or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday or Sunday, or other legal holiday, or other day on which the prothonotary is closed, in which event the period shall run until the end of the next day on which the prothonotary is open. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and other legal holidays shall be excluded in the computation. As used in this rule "legal holidays" shall be those days provided by statute or appointed by the Governor or the Chief Justice of the State of Delaware.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34, 35, and 61(i)(1), except to the extent and under the Conditions stated in them.

(c) Unaffected by expiration of term [Omitted].

(d) For motions; affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 2 days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not less than 1 day before the hearing unless the court permits them to be served at a later time.

(e) Additional time after service by mail. Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon that party and the notice or other paper is served by mail, 3 days shall be added to the prescribed period.

(Adopted, effective Feb. 12, 1953; amended, effective June 1, 1969; Jan. 1, 1977; Oct. 15, 1980; revised, effective Jan. 1, 1992; amended, effective Apr. 14, 1993.)

Rule 46. Release from custody.

(a) Release prior to trial. Eligibility for release prior to trial shall be in accordance with 11 Del.C., c. 21.

(b) Release during trial. A person released before trial shall continue on release during trial under the same terms and conditions as were previously imposed unless the court determines that other terms and conditions or termination of release are necessary to assure such person's presence during the trial or to assure that such person's conduct will not obstruct the orderly and expeditious progress of the trial.

(c) Pending sentence and notice of appeal. Eligibility for release pending sentence shall be in accordance with 11 Del.C. § 4331(a). Eligibility for release pending notice of appeal or expiration of the time allowed for filing notice of appeal shall be in accordance with 11 Del.C. § 4502. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

(d) Sureties.

(1) Justification. Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which the surety proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by the surety and remaining undischarged and all the other liabilities of the surety. No bond shall be approved unless the surety thereon appears to be qualified.

(2) Attorneys and other officers. The prothonotary and the court shall comply with the prohibition of Supreme Court Rule 83 against attorneys or other court officers acting as surety.

(e) Forfeiture.

(1) Declaration. If there is a breach of condition of a bond, the court shall declare a forfeiture of the bail.

(2) Setting aside. The court may direct that a forfeiture be set aside in whole or in part, upon such conditions as the court may impose, if a person released upon execution of an appearance bond with a surety is subsequently surrendered by the surety into custody or if it otherwise appears that justice does not require the forfeiture.

(3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the court and irrevocably appoint the prothonotary as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the prothonotary, who shall forthwith mail copies to the obligors to their last known addresses.

(4) Remission. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

(f) Exoneration. When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

(g) Supervision of detention pending trial. The court shall exercise supervision over the detention of defendants and witnesses within the county pending trial for the purpose of eliminating all unnecessary detention. The attorney general shall make a report when requested by the court as to defendants and witnesses who have been held in custody pending indictment, arraignment or trial of the reasons why such witness should not be released with or without the taking of a deposition pursuant to Rule 15(a) and why the defendant is still held in custody.

(h) Forfeiture of property. Nothing in this rule shall prevent the court from disposing of any charge by entering an order directing forfeiture of property if the value of the property is an amount that would be an appropriate sentence after conviction of the offense charged and if such forfeiture is authorized by statute.

(i) Modification for delay. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer in Superior Court, or if there is unnecessary delay in bringing a defendant to trial, the court may modify the terms for release on bail.

(Adopted, effective Feb. 12, 1953; amended, effective June 1, 1969; May 10, 1973; July 1, 1976; Oct. 15, 1980; revised, effective Jan. 1, 1992.)

Rule 47. Motions; pro se applications.

An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit. The court will not consider pro se applications by defendants who are represented by counsel unless the defendant has been granted permission to participate with counsel in the defense.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 48. Dismissal.

(a) By attorney general. The attorney general may without leave of the court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant or after conviction without leave of the court.

(b) By court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer in Superior Court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 49. Service and filing of papers.

(a) Service: When required. Written motions other than those which are heard ex parte, written notices, designations of record on appeal and similar papers shall be served upon each of the parties.

(b) Service: How made. Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party personally is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.

(c) Notice of orders. Immediately upon the entry of an order made on a written motion subsequent to arraignment the prothonotary shall notify each party thereof and shall make a note in the docket of the notice. Lack of notice of the entry by the prothonotary does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed.

(d) Filing. Papers required to be served shall be filed with the court, except as provided in Rule 16(d)(4). Papers shall be filed in the manner provided in civil actions.

(Adopted, effective Feb. 12, 1953; amended, effective Jan. 1, 1955; June 1, 1969; Mar. 1, 1983; Jan. 2, 1985; revised, effective Jan. 1, 1992.)

Rule 50. Calendars; plans for prompt disposition.

(a) Calendars. The court may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable.

(b) Plans for achieving prompt disposition of criminal cases. To minimize undue delay and to further the prompt disposition of criminal cases, the court shall conduct a continuing study of the administration of criminal justice and shall prepare plans for the prompt disposition of criminal cases.

(Adopted, effective Feb. 12, 1953; amended, effective Sept. 9, 1957; Mar. 31, 1982; revised, effective Jan. 1, 1992.)

Rule 51. Exceptions unnecessary.

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 52. Harmless error and plain error.

(a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 53. Regulation of conduct in the courtroom.

The taking of photographs in the courtroom during the progress of judicial proceedings or radio or television broadcasting or transmitting of judicial proceedings from the courtroom shall not be permitted by the court, except in accordance with rules adopted by the Supreme Court.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 54. Application and exception.

(a) Courts. These rules apply to all criminal proceedings in Superior Court and to preliminary or supplementary proceedings in other courts.

(b) Other proceedings. These rules are not applicable to extraordinary writs, extradition and rendition of fugitives, civil forfeiture of property or the collection of fines and penalties, except to the extent expressly provided.

(c) Application of terms. As used in these rules the following terms have the designated meanings.

"Attorney general" means the Attorney General of the State of Delaware and any authorized deputy attorney general.

"Civil action" refers to a civil action in Superior Court.

"Committing magistrate" refers to any judge of Family Court of the State of Delaware, Court of Common Pleas of the State of Delaware, Municipal Court for the City of Wilmington, Justice of the Peace, Court Commissioner or other person authorized by law to perform judicial functions in proceedings preliminary or supplementary to criminal proceedings in Superior Court.

"Court" refers to Superior Court and any judge thereof, unless the context shows that another court is intended.

"Demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any statute of this state shall be construed to mean the motion raising a defense or objection provided in Rule 12.

"Dismissal" includes nolle prosequi.

"Law" includes the state and federal constitutions, statutes and judicial decisions.

"Oath" includes affirmations.

"Prothonotary" means the Prothonotary of each County and any deputy or clerk in their offices authorized to perform functions of the clerk of the court.

"Public defender" means the Public Defender of the State of Delaware and any authorized assistant public defender.

"State" refers to the State of Delaware.

"Statute" means any public law enacted by the General Assembly of the State of Delaware.

"Superior Court" means the Superior Court of the State of Delaware.

"Supreme Court" means the Supreme Court of the State of Delaware.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 55. Records and exhibits.

(a) Generally; sealed records. The prothonotary and each committing magistrate shall keep records in criminal proceedings in such form as the court may prescribe. No record shall be kept under seal except as provided by statute or these rules, or by order of the court for good cause.

(b) Case numbers; docket entries. The prothonotary shall keep a record of all criminal cases and shall assign each a consecutive identification number. All pleadings, motions, briefs and other papers filed with the prothonotary, all process issued and returns made thereon, all appearances, arguments, opinions, hearings, trials, orders, verdicts and judgments shall be given a docket number and shall be noted chronologically in the list of docket entries of the case. Such notation shall be brief, but shall show the nature of the paper filed or writ issued and returns made thereon, the subject matter of the argument or opinion, the date the opinion is filed and whether it was without oral argument, the elapsed time of the hearing or trial, and the substance of each order of the court. The notation of an order or judgment shall include the date the notation is made. The notation of each proceeding or judicial action shall name the presiding or acting judge.

(c) Custody. The prothonotary shall have custody of the records and papers of the court and of exhibits in evidence, and shall not permit any original record, paper or exhibit to be taken from the courtroom or from the prothonotary's office except at the direction of the court or as provided by statute, by these rules or by the rules of the Supreme Court. The prothonotary shall comply with the procedures set forth in Supreme Court Rule 9 pertaining to the transmission of the record to the clerk of the Supreme Court.

(d) Exhibits. After the final determination of a case all exhibits shall be removed by the party who introduced them. If not so removed the prothonotary shall notify the parties by mail to remove them forthwith, and if they are not removed within 15 days from the date of mailing the notice, the prothonotary may obtain an order of the court for their disposition.

(e) Stenographic notes. Stenographic notes of class A felony cases shall be kept indefinitely unless they are specifically ordered to be destroyed by the court. Stenographic notes of all other felony cases may be destroyed after 20 years, unless otherwise ordered by the court. Stenographic notes of all other criminal matters may be destroyed after 10 years, unless otherwise ordered by the court.

(f) Statistics. The prothonotary shall keep such judicial statistics as the court may direct.

(Adopted, effective Feb. 12, 1953; amended, effective Jan. 1, 1955; revised, effective Jan. 1, 1992.)

Rule 56. Court and proceedings.

(a) When open. The court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The prothonotary's office with a clerk in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays.

(b) Courtroom; chambers. All pleas, hearings, trials and sentencings shall be conducted in open court and so far as convenient in a regular courtroom, unless otherwise provided by statute or these rules. All other acts or proceedings may be done or conducted in chambers. The prothonotary, court reporter and bailiff shall attend all proceedings of the court unless excused by the presiding judge.

(Adopted, effective Feb. 12, 1953; amended, effective Sept. 9, 1957; Oct. 1, 1975; Oct. 15, 1980; Sept. 1, 1983; revised, effective Jan. 1, 1992.)

Rule 57. Rules; procedure not provided.

(a) Adoption; local rules; amendments. The court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice in criminal proceedings pursuant to 11 Del.C. § 5121. Each county by action of a majority of the judges residing therein may from time to time make and amend local rules governing its practice not inconsistent with these rules.

(b) Administrative orders. The court by action of a majority of the judges thereof may enter administrative orders modifying or supplementing the rules governing its practice in criminal proceedings.

(c) Publication; effective date. Copies of rules, amendments and administrative orders shall be published in the manner prescribed by the court and shall be furnished to the prothonotary and made available to the public. Unless otherwise provided, they shall take effect immediately on publication and shall govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

(d) Procedure not provided. In all cases not provided for by rule or administrative order, the court shall regulate its practice in accordance with the applicable Superior Court civil rule or in any lawful manner not inconsistent with these rules or the rules of the Supreme Court.

(Adopted, effective Feb. 12, 1953; amended, effective Oct. 15, 1980; revised, effective Jan. 1, 1992.)

Rule 58. Fees and costs; bank accounts.

(a) Fees and costs. The fees of the prothonotary for the services specified shall be as follows:

NEW CASES

Transfer from the Court of Common Pleas	$100.00
Appeals from Court of Common Pleas	100.00
Indictment by true bill w/o previous commitment	100.00

New information from attorney general's office			100.00
Appeals from Family Court	100.00		
Transfer from Family Court	100.00		
Appeals from inferior courts	100.00		
Commitments from inferior courts		100.00	

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Any other costs shall be as provided in Superior Court Civil Rule 77(h) under Miscellaneous Services and Non-Fee Charges.

(b) Bank accounts. The prothonotary of each county shall maintain interest-bearing bank accounts as required by statute or by the court, including but not limited to accounts for bail deposits, fees and costs, restitution payments and fines, and shall disburse accrued interest in accordance with 10 Del.C. § 2324, 11 Del.C. § 4106(d)(3) or other statute or, in the absence thereof, as directed by the court. The prothonotary shall keep an accurate and complete record of the receipts and disbursements of each account.

(Adopted, effective Feb. 12, 1953; amended, effective Jan. 1, 1988; revised, effective Jan. 1, 1992; amended, effective July 1, 1997; July 1, 2001; Feb. 1, 2002.)

Rule 59. Effective date.

These rules take effect on January 1, 1992. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 60. Title.

These rules may be known as the Superior Court Rules of Criminal Procedure and a rule may be cited thus: Super. Ct. Crim. R. ____.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 61. Postconviction remedy.

(a) Scope of rule.

(1) Nature of proceeding. This rule governs the procedure on an application by a person in custody or subject to future custody under a sentence of this court seeking to set aside

a judgment of conviction or a sentence of death on the ground that the court lacked jurisdiction or on any other ground that is a sufficient factual and legal basis for a collateral attack upon a criminal conviction or a capital sentence. A proceeding under this rule shall be known as a postconviction proceeding.

(2) Exclusiveness of remedy. The remedy afforded by this rule may not be sought by a petition for a writ of habeas corpus or in any manner other than as provided herein.

(b) Motion for postconviction relief.

(1) Form of motion. An application under this rule shall be made by a motion for postconviction relief. The movant must use the prescribed form which shall be made available without charge by the prothonotary. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the movant.

(2) Content of motion. The motion shall specify all the grounds for relief which are available to the movant and of which the movant has or, by the exercise of reasonable diligence, should have knowledge, and shall set forth in summary form the facts supporting each of the grounds thus specified.

(3) Multiple convictions. A motion shall be limited to the assertion of a claim for relief against one judgment of conviction or, if judgments of conviction were entered on more than one offense at the same time because of a plea agreement or joinder of offenses at trial, against multiple judgments entered at the same time. Judgments entered at different times shall not be challenged in one motion but only by separate motions.

(4) Time of filing. A motion may not be filed until the judgment of conviction is final.

(5) Place of filing. A motion shall be filed in the office of the prothonotary in the county in which the judgment of conviction was entered.

(6) Amendment of motion. A motion may be amended as a matter of course at any time before a response is filed or thereafter by leave of court, which shall be freely given when justice so requires.

(c) Duties of prothonotary.

(1) Noncomplying motion. If a motion does not substantially comply with the requirements of subdivision (b) of this rule, the prothonotary shall return it to the movant, if a judge of the court so directs, together with a statement of the reason for its return, and shall retain a copy of the motion and of the statement of the reason for its return.

(2) Entry on docket. Upon receipt of a motion that appears on its face to comply with subdivision (b) of this rule, the prothonotary shall accept the motion and enter it on the docket in the proceeding in which the judgment under attack was entered. If the motion

attacks judgments entered in separate criminal action files, the prothonotary shall place copies of the motion in each file and make the appropriate docket entries.

(3) Assignment of number. The prothonotary shall assign each motion for postconviction relief a separate criminal action number, which must appear on all filings in the postconviction proceeding.

(4) Service of motion. The prothonotary shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the attorney general. The filing of the motion shall not require the attorney general to respond to the motion unless ordered by the court.

(d) Preliminary consideration.

(1) Reference to judge. The original motion shall be presented promptly to the judge who accepted a plea of guilty or nolo contendere or presided at trial in the proceedings leading to the judgment under attack. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge in accordance with the procedure of the court for assignment of its work. The judge shall promptly examine the motion and contents of the files relating to the judgment under attack.

(2) Stay of proceedings. If any part of the record of prior proceedings in the case has been removed in connection with an appeal or federal habeas corpus proceeding, the judge may stay proceedings in this court until it has been returned.

(3) Preparation of transcript. The judge may order the preparation of a transcript of any part of the prior proceedings in the case needed to determine whether the movant may be entitled to relief.

(4) Summary dismissal. If it plainly appears from the motion for postconviction relief and the record of prior proceedings in the case that the movant is not entitled to relief, the judge may enter an order for its summary dismissal and cause the movant to be notified.

(e) Appointment of counsel.

(1) Order of appointment. The court will appoint counsel for an indigent movant only in the exercise of discretion and for good cause shown, but not otherwise. Unless the judge appoints counsel for a limited purpose, it shall be the duty of counsel to assist the movant in presenting any substantial ground for relief available to the movant. Upon entry of a final order in a postconviction proceeding, counsel's continuing duty shall be as provided in Supreme Court Rule 26.

(2) Motion to withdraw. If counsel considers the movant's claim to be so lacking in merit that counsel cannot ethically advocate it, and counsel is not aware of any other substantial ground for relief available to the movant, counsel may move to withdraw. The motion shall explain the factual and legal basis for counsel's opinion and shall give notice that the

movant may file a response to the motion within 30 days of service of the motion upon the movant.

(f) State's response.

(1) Order to respond. If the motion is not summarily dismissed, the judge shall order the attorney general to file a response to the motion or to take such other action as the judge deems appropriate. Unless otherwise ordered, the response shall be filed within 30 days of service of the order to respond upon the state.

(2) Content of response. The response shall explain the factual and legal basis for the state's position on each ground for relief alleged in the motion in sufficient detail to enable the court to determine whether an evidentiary hearing is desirable or summary disposition of the motion is appropriate. If the motion contains inaccurate or incomplete information about prior proceedings, the response shall supply the correct information.

(3) Movant's reply. The movant may file a reply to the state's response within 30 days of service of the state's response upon the movant.

(g) Expansion of record.

(1) Direction for expansion. The judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.

(2) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the motion, documents, exhibits, and contents of the file of an appeal or federal habeas corpus proceeding. If the motion alleges ineffective assistance of counsel, the judge may direct the lawyer who represented the movant to respond to the allegations. Affidavits may be submitted and considered as a part of the record.

(3) Submission to opponent. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the opposing party, who shall be afforded an opportunity to admit or deny their correctness.

(4) Authentication. The judge may require the authentication of any material filed under this subdivision.

(h) Evidentiary hearing.

(1) Determination by court. After considering the motion for postconviction relief, the state's response, the movant's reply, if any, the record of prior proceedings in the case, and any added materials, the judge shall determine whether an evidentiary hearing is desirable.

(2) Time for hearing. If an evidentiary hearing is ordered, it shall be conducted as promptly as practicable, having regard for the need of both parties for adequate time for investigation and preparation.

(3) Summary disposition. If it appears that an evidentiary hearing is not desirable, the judge shall make such disposition of the motion as justice dictates.

(i) Bars to relief.

(1) Time limitation. A motion for postconviction relief may not be filed more than three years after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than three years after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

(2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

(3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

(A) Cause for relief from the procedural default and

(B) Prejudice from violation of the movant's rights.

(4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

(6) Movant's response. If ordered to do so, the movant shall explain on the form prescribed by the court why the motion for postconviction relief should not be dismissed or grounds alleged therein should not be barred.

(j) Reimbursement of expenses. If a motion is denied, the state may move for an order requiring the movant to reimburse the state for costs and expenses paid for the movant from public funds. The judge may grant the motion if the movant's claim is so completely lacking in factual support or legal basis as to be insubstantial or the movant has otherwise

abused this rule. The judge may require reimbursement of costs and expenses only to the extent reasonable in light of the movant's present and probable future financial resources.

(k) Time for appeal. The time for appeal from an order entered on a motion for relief under this rule is as provided in Supreme Court Rule 6. Nothing in these rules shall be construed as extending the time for appeal from the original judgment of conviction.

(l) Capital cases.

(1) Scope of subdivision. This subdivision applies when a defendant seeks to set aside a sentence of death. The defendant shall have a right to one postconviction proceeding under this subdivision. The other subdivisions of this rule shall apply except insofar as they are inconsistent with the special provisions of this subdivision.

(2) Waiver of rights. The defendant may waive the right to a postconviction proceeding or to appeal an adverse ruling. The court shall not accept a waiver without addressing the defendant personally in open court and determining that the defendant understands the legal consequences of the waiver.

(3) Status of representation. When the time for seeking certiorari to review the Supreme Court's order affirming a sentence of death expires or, if the defendant seeks certiorari, when the United States Supreme Court issues a mandate or order finally disposing of the case, the court shall promptly schedule a session with the defendant and defense counsel to determine the status of representation. Counsel who represented the defendant at trial or on appeal may not represent the defendant in the postconviction proceeding permitted by this subdivision unless the defendant and counsel request continued representation. The court may not grant the request without addressing the defendant personally in open court and determining that the defendant understands that the request for continued representation constitutes a waiver of the right to claim that counsel's representation at trial or on appeal was ineffective. If the defendant requests the appointment of new counsel, the court shall promptly rule on that request.

(4) Schedule of proceeding. When the status of representation has been determined, the court shall enter an order setting the schedule of the postconviction proceeding within the following time limits. The motion for postconviction relief shall be filed within 60 days of the date of the scheduling order and shall be submitted for decision within 270 days of the date of the scheduling order. The court for compelling cause may grant an enlargement of not more than an additional 60 days for filing or submission or both, provided that a request for enlargement is made before the expiration of the prescribed time period. If enlargement is granted, the court shall state its finding of compelling cause with specificity. The court shall enter a final order within 60 days of the date of submission.

(5) Sanction for delay. Upon a party's failure to comply with the scheduling order, the court shall immediately issue a rule directing the party to show cause why sanctions should not be imposed for the failure to comply. Unless a defendant shows compelling

cause for failing to comply, the court shall enter an order barring the defendant from filing a motion for postconviction relief or dismissing the defendant's motion for postconviction relief with prejudice.

(6) Date of execution. Following the completion of direct review, the court shall not set a date of execution until the defendant has an opportunity for one postconviction proceeding and review by the Supreme Court. If the defendant waives the right to a postconviction proceeding or to appeal, or the Supreme Court dismisses the defendant's appeal or affirms a ruling adverse to the defendant, the court shall promptly set a date for execution no less than 90 days, unless waived, nor more than 120 days from the date that the waiver was accepted or the Supreme Court's mandate issued.

(7) Stay for further proceedings. The court shall not entertain an application to stay an execution date set pursuant to paragraph (6) of this subdivision for the purpose of further postconviction proceedings. An application to stay execution for federal certiorari or habeas corpus proceedings shall be made to the appropriate federal court. An application to stay execution for any other purpose shall be made in accordance with Supreme Court Rule 35(e).

(m) Definition. A judgment of conviction is final for the purpose of this rule as follows:

(1) If the defendant does not file a direct appeal, 30 days after the Superior Court imposes sentence;

(2) If the defendant files a direct appeal or there is an automatic statutory review of a death penalty, when the Supreme Court issues a mandate or order finally determining the case on direct review; or

(3) If the defendant files a petition for certiorari seeking review of the Supreme Court's mandate or order, when the United States Supreme Court issues a mandate or order finally disposing of the case on direct review.

(Added, effective Jan. 1, 1988; revised, effective Jan. 1, 1992; amended, effective Nov. 9, 1993; May 1, 1996.)

Rule 62. Commissioners.

(a) Each Commissioner shall have all powers and duties conferred or imposed upon Commissioners by law, by the Rules of Criminal Procedure for the Superior Court, and by Administrative Directive of the President Judge, including, but not limited to:

(1) the power to administer oaths and affirmations, to issue orders pursuant to Chapter 21, Title 11 of the Delaware Code concerning release or detention of persons pending trial and to take acknowledgments, affidavits, and depositions;

(2) the power to accept pleas of not guilty to any offenses within the jurisdiction of the Superior Court and to appoint counsel to represent indigent defendants;

(3) the power to accept a plea of guilty to a misdemeanor or to a violation and, with the consent of the parties, to enter sentence thereon.

(4) Non case-dispositive matters. The power to conduct non case-dispositive hearings, including non case-dispositive evidentiary hearings (excluding motions to suppress evidence in a criminal case) and the power to hear and determine any pretrial or other non case-dispositive matter pending before the Court.

(i) The Commissioner shall file an order under subparagraph (4) with the Prothonotary and shall mail copies forthwith to all parties. It shall not be necessary for the Commissioner to include proposed findings of fact and recommendations in any order under this subparagraph.

(ii) Within 10 days after filing of the Commissioner's order under subparagraph (4), any party may serve and file written objections to the Commissioner's order which set forth with particularity the basis for the objections. The written objections shall be entitled "Motion for Reconsideration of Commissioner's Order." A copy of the written objections shall be served on the other party, or to the other party's attorney, if the other party is represented. The other party shall then have 10 days from service upon that party of the written objections to file and serve a written response to the written objections.

(iii) The party filing written objections to a Commissioner's order shall cause a transcript of the proceedings before the Commissioner to be prepared, served, and filed unless, subject to the approval of a judge, all parties agree to a statement of facts.

(iv) A judge may reconsider any hearing or pretrial matter under subparagraph (4) only where it has been shown on the record that the Commissioner's order is based upon findings of fact that are clearly erroneous, or is contrary to law, or an abuse of discretion.

(v) Orders entered under this subparagraph shall be effective immediately, and no motion for reconsideration of a Commissioner's order shall stay execution of the order unless such stay shall be specifically ordered by a judge.

(5) Case-dispositive matters. The power to conduct case-dispositive hearings, including case-dispositive evidentiary hearings, motions to suppress evidence in a criminal case (whether case-dispositive or non case-dispositive), to dismiss or quash an indictment or information, or hearings involving post-conviction relief pursuant to Super. Ct. Crim. R. 61, and to submit to a judge of the Court proposed findings of fact and recommendations for the disposition, by a judge, of any such matter.

(i) The Commissioner shall file proposed findings of fact and recommendations under subparagraph (5) with the Prothonotary, and shall mail copies forthwith to all parties, or to the party's attorney, if the party is represented.

(ii) Within 10 days after filing of a Commissioner's proposed findings of fact and recommendations under subparagraph (5), any party may serve and file written objections

to the Commissioner's order which set forth with particularity the basis for the objections. The written objections shall be entitled "Appeal from Commissioner's Findings of Fact and Recommendations." A copy of the written objections shall be served on the other party, or the other party's attorney, if the other party is represented. The other party shall then have 10 days from service upon that party of the written objections to file and serve a written response to the written objections.

(iii) The party filing written objections to a Commissioner's order shall cause a transcript of the proceedings before the Commissioner to be prepared, served, and filed unless, subject to approval of a judge, all parties agree to a statement of facts.

(iv) A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which an objection is made. A judge may accept, reject, or modify, in whole or in part, the findings of fact or recommendations made by the Commissioner. A judge may also receive further evidence or recommit the matter to the Commissioner with instructions.

(b) A party seeking reconsideration of an order of a Commissioner under subparagraph (4) or appealing the findings of fact and recommendations of a Commissioner under subparagraph (5) who fails to comply with the provisions of this rule may be subject to dismissal of said motion for reconsideration or appeal.

(c) The time periods specified in this Rule may be shortened or enlarged, for good cause, by a judge.

(d) A Commissioner may be assigned such additional duties and powers by the President Judge, or the President Judge's designee, as are not inconsistent with the Constitution and laws of the State of Delaware, with the Criminal Rules of the Superior Court or with an Administrative Directive of the President Judge.

(Added, effective Oct. 21, 1994.)

Rule 63. Admission pro hac vice.

(a) Attorneys who are not members of the Delaware Bar may be admitted pro hac vice in the discretion of the Court, and such admission shall be made only upon written motion by a member of the Delaware Bar who maintains an office in this State for the practice of law ("Delaware Counsel"). Application for admission pro hac vice must be made separately before each Court in which admission is sought. The admission of an attorney pro hac vice shall not relieve the moving attorney from responsibility to comply with any Rule or order of the Court.

(b) Any attorney seeking admission pro hac vice shall certify the following in a statement attached to the motion:

(i) That the attorney is a member in good standing of the Bar of another state;

(ii) That the attorney shall be bound by the Delaware Lawyers' Rules of Professional Conduct and has reviewed the Statement of Principles of Lawyer Conduct;

(iii) That the attorney and all attorneys of the attorney's firm who directly or indirectly provide services to the party or cause at issue shall be bound by all Rules of the Court;

(iv) That the attorney has consented to the appointment of the Prothonotary as agent upon whom service of process may be made for all actions, including disciplinary actions, that may arise out of the practice of law under this Rule and any activities related thereto;

(v) The number of actions in any court of record of Delaware in which the attorney has appeared in the preceding 12 months;

(vi) That a payment for the pro hac vice admission assessment in the amount of $300 is attached to be deposited with the Prothonotary. If the case in which the pro hac vice admission continues into a subsequent calendar year after the year of admission, such assessment shall be deemed an annual assessment to be renewed and be payable on January 1 of each subsequent year and be deemed delinquent if not paid by February 1 of each subsequent year. There shall be no pro rata apportionment of the pro hac vice admission fee. A notice that a pro hac vice admission may be subject to renewal shall be mailed to Delaware counsel by the Court Administrator of the Delaware Supreme Court. It shall be the duty of Delaware counsel to complete the notice stating whether the case in which the pro hac vice admission was granted remains open and to supervise the remittance of the renewal assessment if the case in which the pro hac vice admission was granted remains open.

(vii) Whether the applying attorney has been disbarred or suspended or is the subject of pending disciplinary proceedings in any jurisdiction where the applying attorney has been admitted generally, pro hac vice, or in any other way; and

(viii) The identification of all states or other jurisdictions in which the applying attorney has at any time been admitted generally.

(c) The Prothonotary shall cause the pro hac vice admission assessment to be deposited in the Supreme Court registration fund for distribution as the Supreme Court directs.

(d) Delaware Counsel for any party shall appear in the action in which the motion for admission pro hac vice is filed and shall sign or receive service of all notices, orders, pleadings, or other papers filed in the action, and shall attend all proceedings before the Court, Prothonotary, or other officers of the Court, unless excused by the Court. Attendance of Delaware Counsel at depositions shall not be required unless ordered by the Court.

(e) The Court may revoke a pro hac vice admission sua sponte or upon the motion of a party, if it determines after a hearing or other meaningful opportunity to respond, the contained admission pro hac vice to be inappropriate or inadvisable.

(f) The motion and certificate described in subsections (a) and (b) of this Rule shall be filed as soon as reasonably possible, and they shall be filed no later than the date of the first appearance of the attorney who seeks admission pro hac vice before the Court or the Prothonotary in the matter for which admission is sought.

(g) In exercising its discretion in ruling on a motion for admission pro hac vice, the Court shall also consider whether, in light of the nature and extent of the practice in the State of Delaware of the attorney seeking admission, that the attorney is, in effect, practicing as a Delaware Counsel without complying with the Delaware requirements for admission to the Bar. In its consideration of this aspect of the motion, the Court may weigh the number of other admissions to practice sought and/or obtained by this attorney from Delaware courts, the question of whether or not the attorney in fact maintains an office in Delaware although the attorney is not admitted to practice in Delaware courts, and other relevant factors.

(h) The Delaware Counsel filing a motion pro hac vice for the admission of an attorney not a member of the Delaware Bar shall certify that the Delaware attorney finds the applicant to be a reputable and competent attorney and is in a position to recommend the applicant's admission.

(i) A signed copy of the entire pro hace vice motion shall promptly be filed by the Prothonotary with the Court Administrator of the Delaware Supreme Court for disposition pursuant to Supreme Court Rule 71. The Court Administrator of the Delaware Supreme Court shall provide a copy to Disciplinary Counsel who shall be responsible for contacting Delaware counsel if the information contained in said copy is incomplete.

(Added, Nov. 8, 1995; amended, effective Nov. 7, 1997; Feb. 1, 2003)